

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

SHARON S. CHAND,  
Plaintiff,

v.

MICHAEL S. REGAN,  
Defendant.

Case No. 21-cv-07773-RS

**ORDER GRANTING IN PART AND  
DENYING IN PART MOTION FOR  
SUMMARY JUDGMENT**

**I. INTRODUCTION**

Plaintiff Sharon Chand brings a pro se disability discrimination suit against Defendant Michael S. Regan, Administrator of the Environmental Protection Agency (“EPA”), her former employer. The suit raises five claims for relief: disparate treatment, retaliation, hostile work environment, failure to accommodate, and ADA interference. After two motions to dismiss and two amendments to Chand’s complaint, Defendant now moves for summary judgment on all claims. For the reasons below, the motion is granted as to Chand’s claims of disability discrimination, retaliation, and ADA interference, denied as to the claim of hostile work environment, and denied in part and granted in part as to the claim for failure to accommodate.

**II. BACKGROUND**

The full factual background is set out in greater detail in the prior orders on Defendant’s motions to dismiss. *See* Dkt. No. 27, at 2–3; Dkt. No. 46, at 2. Briefly, Plaintiff was employed by the EPA’s Office of Civil Rights (“OCR”) from September 2013 to September 2015, under an Excepted Service Appointment in accordance with 5 C.F.R. § 213.310(u), also known as Schedule

1 A hiring. Under Section 231.310(u), persons with physical disabilities may be hired on a  
2 temporary basis. After a two-year probationary period, an agency may noncompetitively convert  
3 an employee to the competitive service if their performance has been satisfactory. Plaintiff has  
4 several medical conditions, including deep vein thrombosis (“DVT”), inflammation, and major  
5 depressive disorder, that rendered her disabled before and during her employment.

6 Plaintiff requested and received several accommodations for her disability. Notably, EPA  
7 granted Plaintiff a flexible start time to account for mobility issues resulting from her DVT. Under  
8 this accommodation, Plaintiff could start work up to an hour after her standard start time, adjusting  
9 her end time accordingly.<sup>1</sup> Under this accommodation, Plaintiff was required to e-mail the office if  
10 she would arrive to the office later than her standard start time, but within the hour-long flexible  
11 start window. If Plaintiff would arrive after the one-hour window, she was required to call her  
12 supervisor Gina Edwards or, in Edwards’s absence, Edwards’s supervisor (and Plaintiff’s second  
13 line supervisor), Alexis Strauss. She was also required to take leave in such cases.

14 Plaintiff avers Edwards denied various requests for accommodation of Plaintiff’s  
15 disabilities. At issue are some of Chand’s further requests for modification of her hours and her  
16 request for a chair at a World AIDS Day Event hosted by EPA. Chand also alleges Edwards  
17 created a hostile work environment. Plaintiff first reported these violations to EPA human  
18 resources staff in October 2014. In February 2015, Plaintiff filed a formal complaint against  
19 Edwards. Defendant initiated an investigation and reassigned Plaintiff to a new supervisor,  
20 Carolyn Truong. Defendant also moved Plaintiff to a new floor, closer to Truong and away from  
21 Edwards.

22 In June 2015, Plaintiff began taking leave under the Family and Medical Leave Act  
23 (“FMLA”). On September 18, 2015, the last day of her two-year probationary employment period

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25 <sup>1</sup> Plaintiff’s standard work schedule was initially 8:30 am to 5:00 pm with a 30-minute lunch, but  
26 this schedule later changed to 8:00 am to 4:30 pm. In September 2014, EPA, at Plaintiff’s request,  
27 reverted her standard schedule to 8:30 am to 5:00 pm. For the remainder of her employment,  
28 Plaintiff’s standard work hours were 8:30 am to 5:00 pm with a 30-minute lunch and her one-hour  
flexible start time accommodation.

1 and two weeks after her FMLA leave was extended, Plaintiff was terminated. She filed a formal  
 2 complaint with the EPA’s Office of Civil Rights in December of 2015 and the Equal Employment  
 3 Opportunity Commission (“EEOC”) granted her a Notice of Right to Sue on July 7, 2021. This  
 4 suit followed. Plaintiff has twice amended her complaint. Her Second Amended Complaint  
 5 (“SAC”) invokes the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12112 et seq., and the  
 6 Rehabilitation Act, 29 U.S.C. § 791, to present five claims for relief: (1) disability discrimination  
 7 based on disparate treatment, (2) retaliation (3) hostile work environment, (4) disability  
 8 discrimination based on failure to provide reasonable accommodation, and (5) ADA interference.  
 9 Defendant moves for summary judgment on all claims.

### 10 III. LEGAL STANDARD

11 Summary judgment is proper “if the movant shows that there is no genuine dispute as to  
 12 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a).  
 13 The purpose of summary judgment “is to isolate and dispose of factually unsupported claims or  
 14 defenses.” *Celotex v. Catrett*, 477 U.S. 317, 323–24 (1986). The moving party “always bears the  
 15 initial responsibility of informing the district court of the basis for its motion, and identifying  
 16 those portions of the pleadings, depositions, answers to interrogatories, and admissions on file,  
 17 together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of  
 18 material fact.” *Id.* at 323 (quotation marks omitted).

19 After the moving party meets its burden, the nonmoving party must bring forth material  
 20 facts, or “facts that might affect the outcome of the suit under the governing law” to preclude the  
 21 entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The trial  
 22 court must “draw all justifiable inferences in favor of the nonmoving party, including questions of  
 23 credibility and of the weight to be accorded particular evidence.” *Masson v. New Yorker Mag.,*  
 24 *Inc.*, 501 U.S. 496, 520 (1991). However, “[t]he mere existence of a scintilla of evidence in  
 25 support of the plaintiff’s position” is insufficient to defeat a motion for summary  
 26 judgment. *Anderson*, 477 U.S. at 252. “Where the record taken as a whole could not lead a rational  
 27 trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Matsushita Elec.*

*Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Pro se litigants are subject to the same rules at summary judgment as those represented by counsel. *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010); *see also Jacobsen v. Filler*, 790 F.2d 1362, 1364 (9th Cir. 1986). If the moving party meets its burden and the nonmoving party fails to raise a genuine question of material fact, then the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322–23.

#### IV. DISCUSSION

##### A. Disability Discrimination

The Rehabilitation Act allows federal employees to seek recourse for employment discrimination based on disability. *Boyd v. United States Postal Serv.*, 752 F.2d 410, 413 (9th Cir. 1985). The Rehabilitation Act, though limited to federally funded programs, is otherwise “materially identical to and the model for the ADA.” *Mattioda v. Nelson*, 98 F.4th 1164, 1174 (9th Cir. 2024) (quoting *Castle v. Eurofresh, Inc.*, 731 F.3d 901, 908 (9th Cir. 2013)). Accordingly, “[t]here is no significant difference in analysis of the rights and obligations created by the ADA and the Rehabilitation Act” and courts routinely look to Rehabilitation Act caselaw to interpret rights and obligations under the ADA, and vice versa. *Zukle v. Regents of U. of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

“Discrimination and retaliation claims under the ADA are both subject to the burden-shifting framework outlined in *McDonnell Douglas Corp. v. Green*.” *Curley v. City of North Las Vegas*, 772 F.3d 629, 632 (9th Cir. 2014) (citing 411 U.S. 792, 802–04 (1973)). Under the *McDonnell Douglas* framework, employees averring discrimination have “the initial burden of establishing a prima facie case of discrimination (or retaliation).” *Id.* at 632. If the employee establishes her prima facie case, the employer bears the burden of “provid[ing] a legitimate, nondiscriminatory (or nonretaliatory) reason for the adverse employment action.” *Id.* “If the employer does so, then the burden shifts back to the employee to prove that the reason given by the employer was pretextual.” *Id.*

To state a prima facie case for disparate treatment under the Rehabilitation Act, “a plaintiff

1 must demonstrate (1) she is a person with a disability, (2) who is otherwise qualified for  
 2 employment, and (3) suffered discrimination because of her disability.” *Walton v. U.S. Marshals*  
 3 *Serv.*, 492 F.3d 998, 1005 (9th Cir. 2007) (superseded by statute on other grounds). A plaintiff  
 4 must also show her disability was a but-for cause of the employment action alleged to be  
 5 discriminatory. *See* 29 U.S.C § 791(f) (explaining Section 501 claims are decided using the same  
 6 standard as Title I of the ADA); *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019)  
 7 (“[A]n ADA discrimination plaintiff bringing a claim under 42 U.S.C. § 12112 must show that the  
 8 adverse employment action would not have occurred but for the disability.”).

9 Parties acknowledge Ms. Chand is a person with a disability who was otherwise qualified  
 10 for employment. Plaintiff contends her termination was an adverse employment action motivated  
 11 by her disability. Ms. Chand has established a prima facie case for discrimination, and therefore  
 12 the burden shifts to the Defendant to articulate a legitimate, non-discriminatory reason for its  
 13 termination of Chand.

#### 14 **1. Defendant’s Nondiscriminatory Reason**

15 Defendant avers Plaintiff was terminated because of her performance, rather than her  
 16 disability. Strauss, the ultimate decision-maker on whether to convert or terminate Plaintiff, relied  
 17 on Chand’s supervisor Edwards’s recommendation, in addition to Strauss’s personal knowledge of  
 18 issues with Chand’s work. Plaintiff’s performance is a legitimate, non-discriminatory reason to  
 19 terminate her after the probationary period. Chand avers Defendant’s cited performance problems  
 20 stem from her exercise of her flexible start time, a reasonable accommodation based on her  
 21 disability. However, Defendant has adequately demonstrated the performance problems stemmed  
 22 from Chand’s inability to “take on multiple projects and higher-level responsibilities and perform  
 23 her assignments with the independence and expectations normally required.” Dkt. No. 74, Ex. FF,  
 24 at 1. The necessity of “writing reports, compiling data, and completing projects and providing  
 25 deliverables with accuracy and in a timely fashion,” at the “heart of [Defendant’s] work,” does not  
 26 implicate Plaintiff’s reasonable accommodation or disability. *Id.* Defendant has proffered a  
 27 legitimate, nondiscriminatory reason for Chand’s termination, thus shifting the burden of  
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1 production back to Plaintiff.

## 2 **2. Pretext**

3 Chand is unable to establish a question of material fact as to pretext. A plaintiff can  
 4 demonstrate pretext through either direct or circumstantial evidence. *See Coghlan v. Am. Seafoods*  
 5 *Co. LLC.*, 413 F.3d 1090, 1095–96 (9th Cir. 2005). Chand has presented no direct evidence of bias  
 6 on the part of either Strauss or Edwards. *See id.* at 1095 (“Direct evidence typically consists of  
 7 clearly sexist, racist, or similarly discriminatory statements or actions by the employer.” (citations  
 8 omitted)). Therefore, she must provide “specific and substantial” circumstantial evidence of  
 9 discrimination. *Id.* at 1096. A plaintiff can make an affirmative case that the employer is biased or  
 10 a negative case by showing the employer's proffered explanation for the adverse action is  
 11 “unworthy of credence.” *Id.* at 1095 (citing *Texas Dep't of Community Affairs v. Burdine*, 450 U.S.  
 12 248, 256 (1981)).

13 Viewing the record in the light most favorable to Plaintiff, Chand has not produced  
 14 evidence demonstrating that a discriminatory reason “more likely than not motivated the  
 15 [D]efendant.” *Metoyer v. Chassman*, 504 F.3d 919, 931 (9th Cir. 2007). Plaintiff has not offered  
 16 even circumstantial evidence that Strauss was biased against Chand. She therefore tries to cast  
 17 doubt on Defendant’s proffered explanation.

18 Chand primarily argues performance is a pretextual reason for her termination because she  
 19 was “fully successful” in her role and therefore any evidence Defendant puts forward regarding  
 20 her performance is contradictory. SAC ¶ 63. However, Defendant has adequately shown a “fully  
 21 successful” rating does not automatically entitle Plaintiff to conversion under Schedule A. The  
 22 termination letter from Strauss informs Chand that although “you performed your appointment  
 23 with a ‘Fully Successful’ performance rating, the Agency decided not to retain you beyond your  
 24 trial period.” Dkt. No. 74, Ex. C. Strauss’s communications reflect the text of the Schedule A  
 25 regulation, which give an agency discretion to convert noncompetitively an employee after a  
 26 satisfactory two years of service. *See C.F.R. § 213.3102(u)(6)(i)*. Edwards’s memo, which Strauss  
 27 relied on in part in terminating Chand, acknowledges this discretion and recommends Chand be  
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1 terminated at the end of her probationary period because she did not meet the discretionary  
2 standard for conversion, despite her satisfactory performance in the probationary role.

3 Moreover, “[an] employer does not have to be correct about their proffered justification for  
4 firing; the employer need only have an honest belief about the reason for the decision.” *Villiarimo*  
5 *v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002). Chand does not offer “specific and  
6 substantial” circumstantial evidence that Strauss did not believe Chand’s performance was  
7 grounds for termination. Chand points to evidence Edwards did not believe Chand’s performance  
8 was deficient, or that Edwards was biased against Chand. However, Strauss was the final decision  
9 maker and based Chand’s termination, at least in part, on Strauss’s independent knowledge of  
10 Chand’s performance issues. Plaintiff’s evidence of Edwards’s potential bias or lack of subjective  
11 belief is unavailing.

12 Chand also argues Defendant has offered inconsistent reasons for her termination.  
13 Specifically, she contends Defendant did not identify performance issues until after she filed her  
14 EEO complaint. Shifting justifications can be circumstantial evidence that a proffered explanation  
15 is unworthy of credence, but only if the reasons offered by an employer are incompatible. *See*  
16 *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 918 (9th Cir.1997); *Culver v. Qwest Commc’ns.*  
17 *Corp.*, 306 Fed. Appx. 403, 405 (9th Cir. 2009) (unpublished). Chand has not shown Defendant’s  
18 reasons were inconsistent. While the EPA may not have internally coded her termination as based  
19 on performance, nor directly communicated that reason to Chand, these facts do not amount to  
20 fundamentally different justifications. Defendant refused to exercise its discretion under Schedule  
21 A to convert Chand to a full-time employee and relied at least in part on her performance in  
22 making that decision. *See Aragon v. Republic Silver State Disposal Inc.*, 292 F.3d 654, 661–62  
23 (9th Cir. 2002), *as amended* (July 18, 2002) (finding seasonal downturn and performance were  
24 different, but consistent, non-discriminatory reasons to terminate employee).

25 Finally, Plaintiff points to disputes over internal documents to prove pretext. Chand avers  
26 the internal Report of Investigation (ROI) into Chand’s claims against Edwards was provided to  
27 Strauss in advance of Strauss’s termination of Chand, despite Strauss’s testimony otherwise. She  
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also claims Edwards failed to conduct a required 2015 mid-year review of Chand's performance. Finally, Chand argues Edwards falsified Chand's 2013-2014 PARS to misrepresent the distribution of responsibilities for Chand's role. These disputes cannot create a question of material fact as to pretext because they do not rebut Defendant's evidence of a nondiscriminatory reason to terminate Chand, particularly given Strauss's independent knowledge of Chand's performance issues. Therefore, the motion for summary judgment is granted as to Chand's claim of disability discrimination resulting in her termination.

### **B. Retaliation**

To bring a retaliation claim, a plaintiff must show "(1) [she] engaged in a protected activity, (2) [her] employer subjected [her] to a materially adverse employment action, and (3) a causal link exists between the protected activity and the adverse action." *McCarthy v. Brennan*, No. 15-CV-03308-JSC, 2016 WL 946099, at \*12 (N.D. Cal. Mar. 14, 2016) (citing *Westendorf v. W. Coast Contractors of Nev., Inc.*, 712 F.3d 417, 421 (9th Cir. 2013)). "Causation may be established by direct evidence or 'inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision.'" *Id.* at \*13 (quoting *Yartzoff v. Thomas*, 809 F.2d 1371, 1375 (9th Cir. 1987)). "Causation will be inferred from timing alone only if the proximity is 'very close[.]' such that the 'adverse employment action follows on the heels of protected activity.'" *Id.* (quoting *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001) (per curiam) and *Villiarimo*, 281 F.3d at 1065).

Chand asserts multiple instances of retaliation. First, she avers Defendant moved her to a new supervisor and desk in retaliation for her EEO complaint in February 2015. After the move, Chand claims Edwards continued to be present on Chand's new floor, "walking by Plaintiff's work area, laughing behind Plaintiff's back." SAC ¶ 187. Second, Chand contends the EPA's "sham" investigation was part of its retaliation against her, particularly the investigation's "unreasonable delay." SAC ¶ 190. Plaintiff also avers her request for telework was delayed "without reason." SAC ¶ 189. Finally, Plaintiff claims her termination was in retaliation for her



request to extend her leave into September 2015.

### 1. Retaliation for February 2015 Complaint

Chand is unable to demonstrate she faced an adverse employment action because of her February 2015 complaint against Edwards. Adverse employment actions are “employer interference with ‘unfettered access’ to Title VII’s remedial mechanisms,” specifically “actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers.” *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)). Normally, “petty slights, minor annoyances, and simple lack of good manners will not create such deterrence,” as these do not materially affect the “terms, conditions, or privileges” of a plaintiff’s employment. *Id.*

The EPA moved Chand to another desk to improve her work environment. Chand concedes her new location was closer to her temporary supervisor, Truong. Chand’s discomfort with Edwards’s presence on the floor and her allegation that Edwards was “laughing behind [Chand’s] back” also do not rise to the standard of adverse employment actions. While the relocation and Edwards’s presence could, in certain contexts, amount to adverse employment actions, Chand has made no showing beyond her complaint that these actions were beyond minor annoyances or lack of good manners. *See White*, 548 U.S. at 68–69 (explaining the context, fact-specific analysis necessary for evaluating an adverse employment action); *cf. Chuang v. Univ. of Cal. Davis, Bd. of Trs.*, 225 F.3d 1115, 1125–26 (9th Cir. 2000) (recognizing adverse action in relocation of plaintiffs’ laboratory space on university campus where the plaintiff demonstrated the harm to his career done by the relocation).

Chand has also failed to establish the “delays” of the investigation into Edwards and Chand’s telework request were adverse employment actions. *See Burlington*, 548 U.S. at 68 (holding that even though a plaintiff has a lower burden to establish an adverse employment action within a retaliation claim compared to a discrimination claim, plaintiff must at least show that the alleged retaliatory act “might well have dissuaded a reasonable worker from making or supporting a charge of discrimination”). The adverse employment action need not be severe but must have some effect on a reasonable employee. *See Blount v. Morgan Stanley Smith Barney LLC*, 982 F.

Supp. 2d 1077, 1086 (N.D. Cal. 2013), *aff'd*, 624 Fed. Appx. 965 (9th Cir. 2015) (unpublished) (relying on *McAlindin v. Cnty. of San Diego*, 192 F.3d 1226, 1239 (9th Cir. 1999) and *Bouman v. Block*, 940 F.2d 1211, 1229 (9th Cir.1991)). The EPA promptly investigated and took remedial action after Chand's complaint, even if it took several months to reach a conclusion. Chand has not made any showing or cited to any case holding seven months to conclude an investigation is an unreasonable delay that would discourage a reasonable employee from reporting. Additionally, Chand has not demonstrated she made any formal request to telework. Without any further evidence of harm, a non-answer to an informal request, outside of the EPA's telework procedure, would not discourage a reasonable employee from taking protected action. Therefore, Chand has not established an adverse employment action in retaliation for her February 2015 complaint.

## 2. Retaliation for September 2015 Leave

Chand's termination was an adverse employment action, but her claim fails on the heightened but-for causation standard to make out a prima facie case of retaliation. "Retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." *U. of Texas S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013); *see also T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist.*, 806 F.3d 451, 473 (9th Cir. 2015) (applying the but-for causation standard to retaliation in the disability discrimination context). Neither Strauss nor Edwards were involved with Chand's request for FMLA leave. Truong, her new supervisor, approved her FMLA leave and its extension. The temporal proximity of Chand's FMLA extension request could establish an interference that her leave was a motivating factor for the latter, but the temporal proximity is not enough to establish but-for causation. *See Wood v. Maricopa Cnty. Spec. Health Care Dist.*, 764 Fed. Appx. 579, 580 (9th Cir. 2019) (unpublished) (holding the same). Chand has provided no evidence that but for her request, reviewed and approved by Truong alone, she would not have been terminated by Strauss.

Even assuming Chand could show but-for causation, she would fail to meet her production burden under the *McDonnell-Douglas* framework for the same reasons as above. Defendant has established a legitimate, non-retaliatory reason for terminating Chand and Chand has not demonstrated pretext. Therefore, Defendant's motion for summary judgment is granted as to

Chand's entire claim of retaliation.

### C. Failure to Accommodate

To establish a prima facie case of failure to accommodate under the Rehabilitation Act, Chand must show (1) she is an individual who has a disability, (2) who is otherwise qualified for employment, meaning that she could perform the essential functions of her position with or without a reasonable accommodation, and (3) that Defendant refused reasonably to accommodate her disability. *See Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993); *Blanchard v. Lahood*, 461 F. App'x 542, 544 (9th Cir. 2011). Reasonable accommodations are "mechanisms to remove barriers or provide assistance to disabled individuals so that they can perform the essential functions of employment positions." *Cripe v. City of San Jose*, 261 F.3d 877, 889 (9th Cir. 2001).

Chand claims that she was denied the following four accommodations:

1. On 10/27/2014, Plaintiff was directed by Edwards to report to work 07:45AM even though Plaintiff was approved to start work officially at 8:30AM as an accommodation. SAC ¶152.
2. On 10/30/2014, Edwards denied Plaintiff's request for a one-time consideration of starting work earlier than 8:30AM to find disabled parking and telework. When Plaintiff suggested an alternative of teleworking, another option available as a reasonable accommodation, this too was denied by Edwards. SAC ¶ 153.
3. On 11/21/2014, Plaintiff requested a chair in order to use her foot stool at a Heritage Month event taking place on 12/01/2014. Plaintiff specifically referenced her recent flare-ups. Plaintiff was bed-bound for several days and could not stand for an extended period of time. Edwards refused to provide Plaintiff with a chair. SAC ¶¶ 158–59.
4. On 02/6/2015, Plaintiff met with Vicki Lane, Assistant Human Resources Officer, and Johnson about FMLA. Johnson was the R9 lead for telework and discussed telework, medical telework and other options with Plaintiff. Plaintiff identified the need for medical/telework during the meeting with Johnson. Defendant delayed

1 Plaintiff's request for telework for (4) months until Plaintiff went out on medical  
2 leave in June 2015. Telework was an option available to all Region 9 employees.  
3 Plaintiff does not recall having access for telework as an accommodation provided  
4 by Defendant. SAC ¶¶ 165–66.

5 Defendant is correct that Chand did not make a request for an accommodation on October  
6 27, 2014, when she was directed to report to work by 7:45 am. The only evidence in the record is  
7 Chand's email acquiescing to the request from her supervisor Edwards. Moreover, Defendants  
8 have shown that Chand's start-time accommodation did not include special events she was  
9 required to work. Therefore, this was not a denial of a reasonable accommodation.

10 However, Chand was denied her accommodation request related to October 30, 2014.  
11 Defendant argues her request was "motivated by Plaintiff's own convenience and not any needs  
12 arising from her disability." Dkt. No. 74, at 16. However, Chand's choice of transport is plausibly  
13 related to her disability. Defendant argues Chand's general flexible start time sufficiently covered  
14 such a need, thus obviating any further requirement that Defendant engage in an interactive  
15 process to accommodate Chand. However, "[a]n employer's obligation to engage in the interactive  
16 process extends beyond the first attempt at accommodation and continues when the employee asks  
17 for a different accommodation or where the employer is aware that the initial accommodation is  
18 failing and further accommodation is needed." *Humphrey v. Meml. Hosps. Ass'n*, 239 F.3d 1128,  
19 1138 (9th Cir. 2001). Chand explained her need and why the initial accommodation would not  
20 work for this particular day. Defendant's previous grant of a flexible start time did not obviate  
21 their responsibility to engage with Chand regarding further accommodations, if necessary.  
22 Therefore, this claim for denial of a reasonable accommodation presents a prima facie case.

23 Edwards also denied Chand a chair at the December 1, 2014 event. Defendant contests  
24 whether Chand's presence at the event was an essential job function. Based on the record, a  
25 reasonable factfinder could conclude that Chand's presence handing out ribbons, even if her  
26 primary job was to solicit further volunteers, was also an essential function. Chand adequately  
27 explained her need and her request was denied. Therefore, Chand presents a prima facie case for  
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1 failure to accommodate at the World AIDS Day Event.

2 Finally, Chand has shown that she requested an accommodation of telework. Although  
 3 Defendant explains Chand did not meet the procedural requirements to request telework formally,  
 4 Chand communicated this need well enough to establish her prima facie case. Viewing the record  
 5 in the light most favorable to Chand, there remains a question of material fact as to whether  
 6 Defendant failed to engage in the interactive process by not offering telework as a potential  
 7 reasonable accommodation, even if Chand failed to request it formally. *See Humphrey*, 239 F.3d at  
 8 1138; *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1116–17 (9th Cir. 2000), *vacated sub nom. by U.S.*  
 9 *Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) (ignoring a request for accommodation constituted  
 10 failure to engage in the interactive process).<sup>2</sup> Therefore, Defendant’s motion for summary  
 11 judgment on Plaintiff’s failure to accommodate claim is granted as to the October 27, 2014  
 12 incident, but denied as to the three other requests.

#### 13 **D. Hostile Work Environment**

14 The Ninth Circuit recently “join[ed] the weight of consensus” in recognizing claims of a  
 15 hostile work environment as cognizable under the Rehabilitation Act. *Mattioda*, 98 F.4th at 1174.  
 16 The Ninth Circuit has not endorsed a particular test for hostile work environment claims, despite  
 17 Defendant’s reliance on a district court case that adopts the test from the Fifth Circuit. However,  
 18 based on the reasoning in *Mattioda*, a hostile work environment claim under the ADA and  
 19 Rehabilitation Act would likely mirror one brought under Title VII. *Id.* (endorsing other circuit  
 20 courts’ conclusion that the similarities between Title VII and the ADA allow for hostile work  
 21 environment claims under the ADA); *Garity v. APWU Natl. Lab. Org.*, 655 Fed. Appx. 523, 524  
 22 (9th Cir. 2016) (unpublished) (assuming that if the Ninth Circuit were to recognize hostile work  
 23 environment claims under the ADA, it would apply Title VII law to analyze them). Therefore,

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24 <sup>2</sup> The Supreme Court granted certiorari and vacated the Ninth Circuit’s en banc opinion on a  
 25 different issue than the one of the employer’s obligations to accommodate. “The Court of Appeals  
 26 also correctly held that there was a triable issue of fact precluding the entry of summary judgment  
 27 with respect to whether petitioner violated the statute by failing to engage in an interactive process  
 28 concerning respondent’s three proposed accommodations. This latter holding is untouched by the  
 Court’s opinion today.” *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 407 (2002) (Stevens, J.,  
 concurring) (citation omitted).

1 Chand's hostile work environment claim requires she demonstrate (1) she was subjected to  
2 harassing conduct related to her disability, (2) the conduct was unwelcome; and (3) the conduct  
3 was sufficiently severe or pervasive to alter the conditions of her employment and create an  
4 abusive work environment. *See Reynaga v. Roseburg Forest Products*, 847 F.3d 678, 686 (9th Cir.  
5 2017) (applying this test in the Title VII racial discrimination context); *Ellison v. Brady*, 924 F.2d  
6 872, 875 (9th Cir. 1991) (applying this test in the Title VII gender discrimination context).

7 Courts will determine if the environment was sufficiently hostile or abusive by looking at  
8 all circumstances, including "frequency of the discriminatory conduct; its severity; whether it is  
9 physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably  
10 interferes with an employee's work performance." *Anello v. Berryhill*, No. 18-cv-00070-DMR,  
11 2019 WL 285197, at \*11 (N.D. Cal. Jan. 22, 2019) (quoting *Farragher v. City of Boca Raton*, 524  
12 U.S. 775, 787-88 (1998)).

13 Chand has established a question of material fact as to whether the averred harassment was  
14 related to her disability. Defendant correctly states "the Rehabilitation Act is not a civility code"  
15 and "poor communication skills and rudeness alone do not constitute harassment if not based on  
16 disability." Dkt. No. 74, at 18 (relying on *Young v. Nicholson*, No. CV-05-407-RHW, 2007 WL  
17 128821, at \*13 (E.D. Wash. Jan. 12, 2007) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523  
18 U.S. 75, 80 (1998)). However, Chand points to Edwards's restrictions, in the form of reprimands  
19 and increasingly elaborate procedures, on Chand's use of her flexible start time. A reasonable  
20 factfinder could conclude that these actions constituted harassing conduct based on Chand's  
21 disability because of their nexus with Chand's reasonable accommodation.

22 In multiple emails, Edwards characterized Chand's usage of her flexible start time as  
23 tardiness. While Defendant claims the criticisms of Plaintiff only occurred when Chand was late  
24 for personal reasons, Chand has adequately explained she needed to drive because of her  
25 disability. Edwards was aware of Chand's accommodation and her underlying disability. Despite  
26 this knowledge, Edwards repeatedly characterized Chand's arrival after her scheduled 8:30 a.m.  
27 start time – but within her flexible one hour start window – as tardy. *See, e.g.*, Dkt No. 74, Ex. Q  
28 (Chand emailing to notify Edwards that she arrived at 9:15 a.m., and Edwards responding with



1 concerns about Chand's "tardiness" and stating that Chand must "manage [her] commute to ensure  
2 that [she] arrive at [her] desk by [her] 8:30 am start time). Edwards also used language describing  
3 Chand's mode of transportation as one of personal preference, rather than related to her disability.  
4 Dkt. No. 74, Ex. K (Edwards describing Chand's "excessive amounts of tardiness" attributed to  
5 "outside factors" including "driving around the office looking for free parking"); Ex. A, at 75, 94  
6 (Chand describing her need to find "disabled parking," not "free parking").

7 Edwards also imposed procedural barriers to Chand's exercise of her accommodation.  
8 Defendant alarmingly misstates the facts by contending "the procedures put in place for reporting  
9 late to work related to instances in which Plaintiff would arrive outside of her flexible start time."  
10 This is directly contradicted by the record. *See, e.g.*, Dkt. No. 74, Ex. D (Edwards emailing Chand  
11 that Chand has "up to 1 hour leeway in the mornings to start as late as 9:30 am, with a call letting  
12 us know of your anticipated delay"); Ex. G (Edwards emailing Chand that "due to circumstances  
13 related to your disability you can work as late as 9:30 am...but must contact the office...to  
14 communicate your delay in starting at 8:30 am, your anticipated arrival time"); Ex. H (Edwards  
15 approving an adjusted schedule for two weeks, and outside of that schedule, reminding Chand that  
16 she must call Edwards if Chand does not arrive by 8:00 a.m., with no exception in this procedure  
17 for Chand's flexible start time).

18 Defendant makes much of the fact that Edwards never made explicit statements  
19 disparaging Plaintiff's disability or accommodations, nor did Chand consistently explain to  
20 Edwards how her exercise of her flexible start was related to her disability. However, Edwards  
21 was aware of Chand's disability and accommodation. Edwards modified the procedures around  
22 Chand's use of her flexible start time accommodation multiple times over her nearly two years as  
23 Chand's supervisor. Therefore, Plaintiff has raised a genuine question of material fact as to  
24 whether Edwards reprimands and procedures had a sufficient nexus to Chand's reasonable  
25 accommodation and disability. At the summary judgment stage, the "evolving, multistep process"  
26 instituted by Edwards, paired with her emails scolding Chand for "tardiness" even when she  
27 arrived within the flexible start window could plausibly tie Edwards's conduct to Chand's  
28 disability. Dkt. No. 74, Ex. A, at 144.



The conduct at issue is sufficiently severe or pervasive to survive summary judgment. “The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct.” *Mattioda*, 98 F.4th at 1175–76 (relying on *EEOC v. Nat’l Educ. Ass’n, Alaska*, 422 F.3d 840, 847 (9th Cir. 2005) (quotation marks omitted). “All the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance” inform whether an environment is sufficiently hostile. *Id.* (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)) (quotation marks omitted). Teasing and isolated incidents or comments are generally insufficiently severe or pervasive. *Reynaga*, 847 F.3d at 687; *see also Faragher*, 524 U.S. at 788 (explaining that harassment claims should not be based on “ordinary tribulations of the workplace” (citation omitted)). However, if “hostile conduct pollute[d] the victim’s workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay in her position,” then the plaintiff faced severe or pervasive employer conduct. *Reynaga*, 847 F.3d at 687 (citation omitted). “In close cases...where the severity of frequent abuse is questionable, it is more appropriate to leave the assessment to the fact-finder than for the court to decide the case on summary judgment.” *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1096 (9th Cir. 2008).

Chand testifies Edwards “became more threatening, intimidating, not as accessible...[and the] majority of her communication was via e-mail.” Dkt. No. 74, Ex. A, at 53. That communication “was abrupt, punitive, inflexible, and just became really unapproachable.” *Id.* Chand reinforces her own deposition with Edwards’s emails and Chand’s concerns documented in her internal complaint against Edwards. Witnesses also confirm Edwards’s “harsh and brusque” conduct towards Chand. Dkt. No. 16, Ex. C. While no single interaction was obviously serious, Chand has shown that these potentially smaller incidents occurred with frequency. This conduct, occurring over more than a year, exceeds isolated incidents. Because this is a close call, Chand has raised a question of severity more suited to a factfinder than a court at this stage.

Defendant argues Chand must additionally show Defendant knew or should have known about the harassment and failed to take prompt action to stop it. The Ninth Circuit has not

1 endorsed this additional requirement, and such a showing of vicarious liability is unnecessary  
2 when the averred harasser is a supervisor. *See, e.g., Reynaga*, 847 F.3d at 689; *cf. Mattioda*, 98  
3 F.4th at 1177 (finding that the district court erred in dismissing a plaintiff's claim for hostile work  
4 environment under the ADA when he plausibly alleged disability-related harassment, committed  
5 by his supervisor and rising to the level of severe or pervasive). Even assuming such a step is  
6 necessary for a hostile work environment claim under the Rehabilitation Act, Chand sufficiently  
7 alleges Defendant failed to act on her complaint of harassment. Although Plaintiff was moved to a  
8 new supervisor after her February 2015 complaint, a reasonable finder of fact could conclude that  
9 Defendant's failure to keep Edwards away from Chand even at Chand's new desk location  
10 constituted failure to remedy. Whether Defendant's investigation was sufficient is a question  
11 inappropriate for this stage. Therefore, Defendant's motion for summary judgment on Plaintiff's  
12 hostile work environment claim is denied.

### 13 **E. ADA Interference**

14 In the SAC, Chand raises a new claim of interference with her rights under the ADA. The  
15 anti-interference provision of the statute protects "the exercise or enjoyment of ... any right  
16 granted or protected by this chapter." 42 U.S.C. § 12203(b) (emphasis added). "[I]t is clear that,  
17 given the broad remedial purpose of the ADA, the plain language of [the anti-interference  
18 provision] clearly prohibits a supervisor from threatening an individual with transfer, demotion, or  
19 forced retirement unless the individual foregoes a statutorily protected accommodation." *Brown v.*  
20 *City of Tucson*, 336 F.3d 1181, 1192–93 (9th Cir. 2003). As explained, the same analysis applies  
21 for claims brought under the Rehabilitation Act. *See Child v. San Bernardino Unified Sch. Dist.*,  
22 35 Fed. Appx. 521, 523 (9th Cir. 2002) (unpublished) (locating plaintiff's right to sue in the anti-  
23 retaliation portions of both the ADA and the Rehabilitation Act, which makes it unlawful for an  
24 employer to intimidate or retaliate "for the purpose of interfering with any right"); *see also Frakes*  
25 *v. Peoria Sch. Dist. No. 150*, 872 F.3d 545, 550 (7th Cir. 2017) ("Put simply, Section 504  
26 employment discrimination is controlled by the standards of the ADA and a claim for  
27 "interference" pursuant to Section 504 is established pursuant to the standards of the ADA.").

While recognizing that “conclusory allegations—without more—are insufficient to state a violation” of this provision, a plaintiff can demonstrate that she has suffered a “distinct and palpable injury” resulting from the threat. *Brown*, 336 F.3d at 1193. “That injury could consist of either the giving up of her ADA rights, or some other injury which resulted from her refusal to give up her rights, or from the threat itself.” *Id.* (relying on *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001), *Bachelder v. Am. West Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001)).

Defendant argues Chand has not made specific facts or allegations in association with an ADA interference claim, thus entitling Defendant to judgement as a matter of law. While Chand has, at other points, referenced facts potentially relevant to a claim of interference under the ADA and the Rehabilitation Act, she has failed to present any evidence in opposition to Defendant’s motion for summary judgment. Therefore, she has failed to demonstrate there is a genuine dispute as to this claim. *See Bias v. Moynihan*, 508 F.3d 1212, 1219 (9th Cir. 2007). Defendant’s motion for summary judgment is granted as to Plaintiff’s claim of ADA interference.

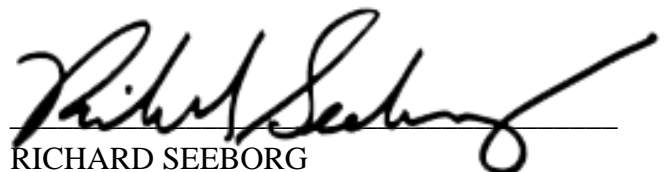
### V. CONCLUSION

Defendant’s motion for summary judgment is granted as to Plaintiff’s claims of disability discrimination, retaliation, and ADA interference. The motion is also granted as to Plaintiff’s claim of failure to accommodate her on October 27, 2014. Defendant’s motion is denied as to Plaintiff’s accommodation claims regarding an adjusted start on October 30, 2014, seating during the December 1, 2014 event, and telework. Defendant’s motion is also denied as to Plaintiff’s claim of hostile work environment.

A status conference is set for January 23, 2025. Parties should submit a status report by January 16, 2025.

**IT IS SO ORDERED.**

Dated: December 26, 2024

  
RICHARD SEEBORG  
Chief United States District Judge